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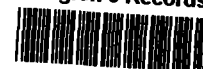
January 28, 2003

FVLD

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77 West Jackson Boulevard
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EPA Region 5 Records Ctr.



226747

Re: 245-53 East Ohio Street, 242-256 East Grand Street, Chicago, Illinois (the "Property")

Dear Ms. Fulghum:

I am writing pursuant to your request that I provide legal and factual substantiation for the position that the present owners of the above property are not responsible for clean-up costs under CERCLA in respect of the thorium residue at the Property. I am also enclosing a declaration of Mr. Alfred E. D'Ancona, III, a trustee of both of the trusts that are the current owners of the above property, describing the history of the property since the death in 1971 of his grandfather, Henry R. Levy, whose will bequeathed the property to the current owners.

As we have discussed in our prior meetings, any material on the Property that may be characterized by elevated levels of radioactivity is entombed beneath asphalt paving that covers the Property and attenuates any radiation to negligible levels over the level of background radiation. The property has been a paved parking lot since 1958, which precludes any deposit or release of thorium on or from the Property since that time. The current owners will not disturb soil beneath the pavement except pursuant to a Work Plan approved by the U.S. E.P.A. Therefore, no release of radioactive materials from the Property is threatened or imminent. Instead, I am writing to explain to you why the current owners qualify for the "innocent landowner" exemption from liability under CERCLA.

Applicable CERCLA Provisions.

Under 42 U.S.C. §§ 9607(a), present owners are liable for disposal of hazardous substances at a site. However, Under 42 U.S.C. § 9607(b)(3), present owners are not liable for a "release" of hazardous materials if:

1. the release of hazardous materials were caused solely by a third party;
2. the third party's act did not occur in connection with contractual relationship with the present owners;
3. the present owners exercised due care with respect to hazardous substances;
and

4. The present owners have taken precautions against the third party's foreseeable acts and consequences.

A "contractual relationship" includes real estate contracts and deeds, and the present owner is liable if the hazardous substances were released by a predecessor owner of the property unless the present owner acquired the property after disposal of hazardous substances, except that the present owners are not liable if they acquired the property "by inheritance or bequest." (42 U.S.C. § 9601(35)(A); 42 U.S.C. §§ 9607(b)(3)(a) and (b)).

As set forth below. All of these factors are present here. The property has been paved since 1958, precluding any source of thorium on the property other than Lindsay Light, which must have generated the thorium before it left the Streeterville area in 1933, and possibly other third parties. The present owners, two trusts created under decedents' wills, indisputably acquired the property by bequest. The present owners have exercised due care regarding possible thorium contamination since learning of the possibility in 2001, and have proactively surveyed the property and begun discussions with the U.S. E.P.A. regarding complete clean-up of thorium on the property.

History of the Property.

Location.

The property comprises approximately the eastern 150 feet of the block bounded by Ohio Street on the north, Fairbanks Court on the east, Grand Avenue on the south, and St. Clair Street on the west. It is located in a neighborhood of the City of Chicago just north of the Chicago River and east of Michigan Avenue known as Streeterville. Streeterville was originally a low, marshy area, but began to be filled in the late 19th century, with rubble from the Great Chicago Fire of 1871 as well as with other fill material.

Source of Possible Thorium Contamination.

From around 1910 until around 1933, Lindsay Light Chemical Company ("Lindsay Light") manufactured incandescent mantles for gas lanterns in Streeterville using solutions that contained radioactive thorium. During at least part of this period, Lindsay Light refined monazite (thorium-containing ore) in Streeterville and generated quantities of tailings that also contained radioactive material. Apparently, tailings and other material from Lindsay Light's operations were used as fill in the Streeterville area in the early twentieth century.

Although not well-publicized, in the 1980s, elevated levels of radioactivity were discovered at the original Lindsay Light building at 161 East Grand Avenue (diagonally across from the southwest corner of the block on which the Property is located). Investigation and clean-up activities were initiated. In the late 1990s, it became known that subsurface soils in the

Streeterville might be contaminated with thorium from the Lindsay Light operations, resulting in Administrative Orders by Consent by the U.S. Environmental Protection Agency, Region 5 ("USEPA") requiring clean-up of two thorium-contaminated sites.

Ownership of the Property.

Lindsay Light never owned the Property. A copy of a title report from a tract book search conducted by Chicago Title and Trust Company from 1890 to 1930 (roughly the time period when Lindsay Light was active in Streeterville) is attached as Exhibit A. This shows that the property was owned in 1930 by the estate of Stanley McCormick, whose widow sold the Property to the current owners' predecessor in 1948. *Chicago Title*

The current beneficial owners of the Property are trusts that were residuary legatees under the will of Henry R. Levy, who died in 1971, and acquired beneficial ownership of the property by distribution from Mr. Levy's estate in 1975. At his death and for many years before his death, Mr. Levy was the sole owner of a company named Studebaker Sales Company of Chicago until 1958 and thereafter Henry R. Levy Co. ("Levy Co."). Levy Co. operated the Chicago dealership for Studebaker automobiles until the late 1950s, when it sold the dealership and related assets and continued its existence as a personal holding company holding securities and real estate.

Levy Co. acquired the property in 1948 from Katherine Dexter McCormick. Levy Co. owned the Property continuously from 1948 until Mr. Levy's death. A copy of the deed from Mrs. McCormick to Levy Co. is attached as Exhibit B.

When Mr. Levy died, the Circuit Court of Cook County admitted his will to probate and issued letters of office to the executors named in Mr. Levy's will. The executors liquidated and dissolved Levy Co. for tax reasons. In the course of liquidating and dissolving Levy Co., the executors under Mr. Levy's will, transferred title to the Property to an Illinois Land Trust and held the beneficial interest in that land trust for a time. When administration of Mr. Levy's probate estate was complete in 1975, the executors transferred a 50% beneficial interest with power of direction to each of two trusts that Mr. Levy's will created. Mr. Levy's will gave the primary beneficiary of each trust a testamentary power of appointment to distribute the trust's property among his descendants pursuant to the primary beneficiary's will upon the primary beneficiary's death.

One of the trusts that received a half-interest in the Property through a land trust has maintained ownership until the present. The primary beneficiary of the other trust died in 1994, leaving a will that exercised the power of appointment that had been granted under Mr. Levy's will. The primary beneficiary appointed his trust under Mr. Levy's will to a separate trust under the primary beneficiary's own will.

Use of the Property – Levy Estate and Current Owners

The Property was a paved advance-pay parking lot with a filling station on the northeast corner at the time of the death of Henry Levy. The filling station was closed in the mid-1970s. The underground storage tanks that held the gasoline sold by the filling station were removed in 1994 under supervision of environmental consultants, and the soil excavated to remove those tanks was backfilled. Other than that, the property has been a paved parking lot leased to parking lot operators throughout the ownership of the current owners.

Use of the Property – Henry R. Levy Co.

Sources of information regarding uses of the land before the death of Mr. Levy include recollections by Mr. Levy's grandson of Mr. Levy's statements regarding the property, a 1958 survey of the property (a copy of which is attached to Mr. D'Ancona's declaration), and Sanborn fire insurance maps of the property.

A survey dated 1958 that the current owners acquired from the Levy Estate shows that the Property was a parking lot in the same condition as at Mr. Levy's death in 1971. Mr. Levy told his grandson, Alfred E. D'Ancona, III that Levy Co. bought the Property to hold excess automobiles in the Studebaker dealership inventory, and that the property was occupied by "a horse barn" when he bought it. Before that time, Sanborn fire insurance maps show that the property apparently was occupied by the filling station on the northeast corner, and by two-story warehouse-type structures without basements on the remainder of the north half and on the south half of the Property. The 1927 Sanborn map shows the same (or similar) use of the property. It therefore appears that the surface of the property has been at the present grade at least since 1927. Consequently there was almost certainly no occasion after 1927 for anyone to add fill that might have come from Lindsay Light operations. Any thorium in subsurface soils on the property must have been placed there by a third party before 1927.

Moreover, it is clear that neither Mr. Levy nor Levy Co. had either an occasion or an opportunity to deposit thorium-containing soil on the Property because Lindsay Light left Streeterville fifteen years before Mr. Levy's company bought the Property with structures already on it.

The Third-Party Defense / Innocent Landowner Provision of CERCLA Absolves the Current Owners of Cleanup Liability

It is clear beyond peradventure that any thorium-containing soil was placed on the Property by a third party long before the current owners acquired the property in 1975. The property has been a paved parking lot since 1958 – seventeen years before the current owners acquired the Property. The only on-site excavations since the current owners acquired the

property have been undertaking by elevated environmental contractors in a UST removal in 1994, and borings to test for elevated levels of radiation in 2001.

Moreover, it is clear that the current owners, the trusts that received the property under Henry Levy's will, acquired the property by bequest or inheritance. The Will and Codicil of Henry R. Levy, as admitted to probate in the Circuit Court of Cook County, are attached as Exhibit C here to. It clearly bequeaths the residue of his estate to two trusts, one named for each of his grandsons, Alfred E. D'Ancona, III and H. Richard D'Ancona. Pursuant to the provisions of the Will, Mr. Levy's estate distributed the Property to those trusts.

Federal and state courts consistently apply the innocent landowner exception to CERCLA liability for cleanups to owners that acquire property by inheritance or bequest. *U.S. v. Pacific Hide and Fur Depot*, 716 F. Supp. 1341 (1989); *Starr v. Comm'r*, 675 A.2d 430 (Conn. S. Ct. 1996).

The fact that recorded legal title to the Property has been held by Illinois land trusts since shortly after Mr. Levy's death, and at all times since it was distributed from his estate, is disregarded. Federal courts in Illinois have consistently held that beneficial owners of Illinois land trusts, and not the land trusts or land trust trustees, are CERCLA "owners" of real property for cleanup liability purposes.¹

This conclusion is not affected by the fact that one of the current owners is a trust under the Will of H. Richard D'Ancona. The fact that H. Richard D'Ancona, by his last will, exercised a power of appointment over his trust under the Will of Henry R. Levy, resulting in the transfer of that trust's interest in the Property to a trust created under H. Richard D'Ancona. "A power of appointment is authority, other than as an incident of the beneficial ownership of property, to designate recipients of beneficial interests in property." Restatement Second of Property §11.1. The Illinois Supreme Court has noted, concerning powers of appointment, that:

In considering this problem [whether or not appointive property is included in the probate estate of the donee of the power] we may start with firmly established principles of law governing the operation of powers of appointment. Repeated decisions have held that a power of appointment is not property and that the donor does not vest title to the property in the donee of the power, (*Oglesby v.*

¹ See, e.g., *Premium Plastics, Inc. v. La Salle Nat'l Bank*, No. 92 C 413, 1992 U.S. Dist. LEXIS 16119 (E.D. Ill. 1992); *United States v. Peterson Sand & Gravel, Inc.*, 806 F. Supp. 1346 (N.D. Ill. 1992); *United States v. N.L. Indus.*, No. 91-578-JLF, 1992 U.S. Dist. WESTLAW 359,986 (S.D. Ill. 1992). See also *Chicago Title & Trust Co.*, 389 N.E.2d at 543-44 (distinguishing Illinois land trust trustee from "owner").

Springfield Marine Bank, 385 Ill. 414; *Botzum v. Havana National Bank*, 367 Ill. 539); **that the objects of an appointment take from the donor, not the donee of the power**, (*People v. Kaiser*, 306 Ill. 313); that the property passing pursuant to the exercise of the power passes under the instrument creating the power, just as though the appointment were read into the original instrument, (*Keays v. Blinn*, 234 Ill. 121; *Christy v. Pulliam*, 17 Ill. 59); and that property subject to the power passes as a part of the estate of the donor of the power. *United States v. Field*, 255 U.S. 257, 65 L. ed. 617." *In re Estate of Breault*, 29 Ill.2d 165, 174 (1963) (emphasis added)

Thus, the trust under the Will of H. Richard D'Ancona that currently is a half-owner of the Property received its interest in the Property from the Estate of Henry R. Levy "by inheritance or bequest" within the meaning of CERCLA.

As a result of the foregoing, both trusts that currently own the Property cannot have a "contractual relationship" with a prior owner or occupant of the Property that might have deposited the waste there. 42 U.S.C. § 9601(35)(A)(iii). The current owners therefore are excluded from cleanup liability under 42 U.S.C. § 9607(a). Furthermore, in the event that U.S. E.P.A. issues a unilateral administrative order ("UAO") (or an amendment to a currently-existing UAO) for clean-up against the current owners under 42 U.S.C. § 9601(a), 42 U.S.C. § 9606(b)(2)(c) entitles the current owners to obtain reimbursement for clean-up expenditures incurred pursuant to that order.

Moreover, after the current owners learned of the potential presence of radioactive waste beneath the paving on the Property resulting from acts or omissions of third parties before the current owners acquired the property, the current owners clearly exercised "due care" with respect to possible radioactive waste, and the consequences of the radioactive waste possibly having been buried on the Property by third parties long ago. The current owners, together with a prospective purchaser, hired Conestoga-Rovers & Associates ("CRA"), one of the country's leading environmental consulting firms, to investigate the situation and advise them. CRA, in turn, hired Schrack Environmental Consulting, Inc., which is familiar with thorium testing in Streeterville in connection with studies required by U.S. E.P.A., to test for elevated levels of radioactivity in borings on the Property. Both CRA and Schrack Consulting documented their activities precisely, and neither has caused a release of hazardous materials for purposes of CERCLA. Finally, in approaching the U.S. E.P.A. with the prospective purchaser, the current owners have made it clear that they will not disturb the paving that protects the public from whatever is beneath the paving except pursuant to a Work Plan approved by U.S. E.P.A.

Under 42 U.S.C. 9607(b), therefore, the current owners are not liable for cleanup obligations that otherwise might be imposed under CERCLA.

Mary L. Fulghum, Esq.
January 28, 2003
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Please feel free to contact me should you have any questions in regard to the matters that I have addressed in this letter.

Very truly yours,

A handwritten signature in cursive script, appearing to read "Wilson P. Funkhouser", with a long horizontal flourish extending to the right.

Wilson P. Funkhouser

WPF/ms